160 U.S. 668

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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. ~~999~~. 799

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

A CERTAIN TRACT OF LAND IN CUMBERLAND TOWNSHIP, ADAMS COUNTY, STATE OF PENNSYLVANIA.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

FILED MAY 1, 1895.

(15883.)

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1 UNITED STATES OF AMERICA, ss.

The President of the United States to the honorable judges of the circuit court of the United States for the eastern district of Pennsylvania, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, or some of you, between The United States of America and A certain tract of land in Cumberland Township, Adams County, State of Pennsylvania, a manifest error hath happened, to the great damage of the said The United States of America, as by its complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington within thirty days, in the said Supreme Court of the United States, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at Philadelphia, the 29th day of April, in the year of our Lord one thousand eight hundred and ninety-five.

[SEAL.] SAMUEL BELL,
Clerk of the Circuit Court of the United States,
Eastern District of Pennsylvania.

Allowed by—
GEO. M. DALLAS, *Cir. Judge.*
APRIL 29, 1895.

2 UNITED STATES OF AMERICA, ss.

The President of the United States, to a certain tract of land in Cumberland township, Adams County, State of Pennsylvania, greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at the city of Washington within thirty days, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States in and for the eastern district of Pennsylvania, in the third circuit, wherein the United States of America is plaintiff in error and you are defendant in error, to show cause, if any there be, why the decree rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable George M. Dallas, judge of the circuit court of the United States, this 29th day of April, in the year of our Lord one thousand eight hundred and ninety-five.

GEO. M. DALLAS,
Cir. Judge.

APRIL 29, 1895.

3 Service accepted for the Gettysburg Electric Railway Company, the owner of the said tract of land, and respondent below, April 29th, 1895. Thomas Hart, jr., atty.

On this 30th day of April, in the year of our Lord one thousand eight hundred and ninety-five, personally appeared Loyd J. Hunt before me, the subscriber, and makes oath that he delivered a true copy of the within citation to Thomas Hart, esq., attorney for defendant, who accepted service of the writ as appears above.

LOYD J. HUNT,
Dept. U. S. Marshal.

Sworn to and subscribed the 30th April, A. D. 1895.

SAMUEL BELL,
U. S. Com's'r.

4 In the circuit court of the United States in and for the eastern district of Pennsylvania, in the third circuit.

THE UNITED STATES OF AMERICA
vs.
A CERTAIN TRACT OF LAND IN CUMBERLAND Township, Adams County, State of Pennsylvania. } No. 64. October sessions, 1894.

UNITED STATES OF AMERICA,
Eastern district of Pennsylvania, ss:

Pleas and proceedings before the honorable the judges of the circuit court of the United States in and for the eastern district of Pennsylvania, in the third circuit, of October sessions, 1894. No. 64.

It is thus contained:

Be it remembered that on the 21st day of January, in the year of our Lord one thousand eight hundred and ninety-five, The United States of America, by its attorney, Ellery P. Ingham, esq., comes into court here and files its petition against a certain tract of land in Cumberland Township, Adams County, State of Pennsylvania, which being read is in the words and figures following, to wit:

5 In the circuit court of the United States for the eastern district of Pennsylvania, in the third district.

THE UNITED STATES OF AMERICA
vs.
A CERTAIN TRACT OF LAND, SITUATE IN Cumberland Township, Adams County, in the State of Pennsylvania.

To the honorable the judges of the circuit court of the United States for the eastern district of Pennsylvania, in the third circuit:

The United States of America, by Ellery P. Ingham, esq., its attorney, comes and respectfully represents:

1. That by an act of Congress, approved August 1st, 1888, entitled "An act to authorize condemnation of land for sites of public buildings

and for other purposes," it is provided "That in every case in which the Secretary of the Treasury, or any other officer of the Government, has been or hereafter shall be authorized to procure real estate for the erection of a public building or for any other public uses, he shall be and hereby is authorized to acquire the same for the United States by condemnation, under judicial process, whenever in his opinion it is necessary or advantageous to the Government to do so, and the United States circuit or
6 district courts of the district wherein such real estate is located shall have jurisdiction of proceedings for such condemnation, and it shall be the duty of the Attorney-General of the United States, upon every application of the Secretary of the Treasury, under this act, or such other officer, to cause proceedings to be commenced for condemnation within thirty days from the receipt of the application at the Department of Justice."

That section 2 of said act of Congress of August 1st, 1888, provides that—

"The practise, pleadings, forms and modes of proceedings in causes arising under the provisions of this act shall conform, as near as may be, to the practise, pleadings, forms, and proceedings existing at the time in like causes in the courts of record of the State within which such circuit or district courts are held, any rule of the court to the contrary notwithstanding."

2. That by an act of the general assembly of the State of Pennsylvania, approved June 8th, 1874, and entitled "An act providing a mode by which the title to all estates and interests in lands in the State of Pennsylvania may be vested in the United States when no agreement can be made with the owners of the same for the purchase thereof," it is provided "That if it shall so happen that the United States cannot agree for the purchase thereof with the owner or owners of any estate or interest in lands proposed to be taken as part of the premises which the United States are or may be authorized to acquire in this Commonwealth, for any public use or purpose whatever, it shall be lawful for the court of common pleas of the county in which said lands are situate, on application thereto by petition filed in behalf of the United States, after such notice to the owners of such estates and interests as the court shall direct, to appoint seven discreet and disinterested resident freeholders of the said county, who, having been duly qualified and having given such public notice and such notice to the owners of the said estates or interests
7 as the court may direct, shall estimate and determine the fair value of all and singular the estates or interests in the lands so proposed to be taken for the use of the United States as aforesaid, and shall designate the several owners thereof as far as the same can by them be reasonably ascertained, and shall report the same to the said court, and their award shall be subject to appeal, further proceedings, and confirmation; and upon confirmation of the report and payment of the sums of money so awarded to the parties severally entitled thereto, who shall have executed conveyances to the United States of their respective interests in the lands so taken, or in case of the disability, neglect, or refusal of any person or persons interested to make such conveyance, then upon payment into the court of the sums of money awarded such person or persons respectively the title to the lands and estates, or other interests therein

thus paid for, shall become vested in fee in the United States, of which the conveyance from the said parties, or an exemplification of the record of the said court in the premises, shall be the proper and sufficient evidence: Provided, That where the lands proposed to be taken by the United States, as aforesaid, are situate within any town or city having more than ten thousand inhabitants, the viewers contemplated by this act shall be residents of such town or city."

3. That by an act of Congress of the United States of America, approved on the third day of March, A. D. 1893, entitled "An act making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and ninety-four, and for other purposes," it is provided, inter alia, as follows: "Monuments and tablets at Gettysburg. For the purpose of preserving the lines of battle at Gettysburg, Pennsylvania, and for properly marking with tablets the positions occupied by the various commands of the armies of the Potomac and of Northern Virginia on that field, and for opening and
8 improving avenues along the positions occupied by troops upon those lines, and for fencing the same, and for determining the leading tactical positions of batteries, regiments, brigades, divisions, corps, and other organizations with reference to the study and correct understanding of the battle, and to mark the same with suitable tablets, each bearing a brief historical legend, compiled without praise and without censure, the sum of twenty-five thousand dollars, to be expended under the direction of the Secretary of War."

4. That by a joint resolution of Congress, approved June 6th, 1894, entitled "Joint resolution authorizing the purchase or condemnation of land in the vicinity of Gettysburg, Pennsylvania," it is provided as follows:

"Whereas Congress appropriated by the act of March third, eighteen hundred and ninety-three, the sum of twenty-five thousand dollars to acquire certain lands for the purpose of preserving the lines of battle at Gettysburg, Pennsylvania, and for properly marking the positions occupied by the various commands of the armies of the Potomac and Northern Virginia on that field, and for opening and improving avenues along the positions occupied by the troops, and for determining the leading tactical positions of both armies; and

"Whereas an appropriation for the further sum of fifty thousand dollars is now under consideration by Congress for like purposes which has passed the House of Representatives during the present session and is now pending in the Senate; and

"Whereas it has been recently decided by the United States court, sitting in Pennsylvania, that authority has not yet been distinctly given for the acquisition of such lands as may be necessary to enable the War Department to execute the purposes declared in the act aforesaid; and

"Whereas there is imminent danger that portions of said battlefield may be irreparably defaced by the construction of a railway over the same, thereby making impracticable the execution of the provisions of
9 the act of March third, eighteen hundred and ninety-three: Therefore, be it

"Resolved, By the Senate and House of Representatives of the United States of America in Congress assembled, that the Secretary of War is

authorized to acquire by purchase (or by condemnation) pursuant to the act of August first, eighteen hundred and eighty-eight, such lands or interest in lands, upon or in the vicinity of said battlefield as, in the judgment of the Secretary of War, may be necessary for the complete execution of the act of March third, eighteen hundred and ninety-three: Provided, That no obligation or liability upon the part of the Government shall be incurred under this resolution nor any expenditure made except out of the appropriations already made and to be made during the present session of this Congress."

5. That in order to carry out the purposes of the aforesaid act of March 3d, 1893, it is necessary that the United States acquire title in fee simple to a tract of land, situate in Cumberland Township, Adams County, Pennsylvania, now owned or claimed by "the Gettysburg Electric Railroad Company," which said tract of land is shown in the blue print hereto attached and made a part of this petition, and is described as follows:

Beginning at a point in the centre line of the Gettysburg Electric Railway, the said point being N. 73° 14′ E. 323 feet from a cannon marker for the left of Robinson's division, 1st corps. This marker is 33 feet from the northwest corner of a house of Jacob Benner's estate; thence S. 3° (degrees) 20′ W. 537 feet to a stake on a line of Jacob Benner; thence along said line N. 73° 45′ E. 5.4 feet; thence along a boundary line of the Gettysburg Memorial Association S. 3° 15′ W. 318 feet to a stake; thence on said boundary line N. 87° 30′ W. 5 feet; thence along said boundary line S. 2° 30′ W. 185 feet to a stake on a corner of F. W. Middleton et al., trustee; thence N. 87° 30′ W. 30 feet to a corner of said F. W. Middleton; thence S. 2° 30′ W. 30 feet to a corner of said Middleton; thence S. 87° 30′ E. 30 feet to a corner of said Middleton; thence by land of said association S. 2° 30′ W. 209.3 feet to a stake; thence still by land of said association south 336.6 feet to a stake; thence still by land of said association S. 0° 52′ E. 310.5 feet to a stake; thence still along said boundary line S. 6° W. 133.9 feet to a stone set up for a corner; thence still along said boundary line S. 34° W. 539.5 feet to a stake; thence still along said boundary line S. 15° W. 62 feet to a stake on a line of the Round Top Railroad; thence along said boundary line of said railroad N. 15° 20′ W. 163 feet to a stake; thence along the boundary line of Simon J. Codori N. 45° 8′ E. 318 feet to a point; thence by curve to the left concentric with a centre line of the Gettysburg Electric Railway Company, and 15 feet from said line at right angles, 316 feet to a point; thence N. 0° 52′ W., still on boundary line of said Codori 580.4 feet to a point; thence by a curve to the right 210 feet to a point 36 feet distant from the east line of said electric railroad property; thence N. 3° 20′ E. 504.9 feet to a point; thence still along said boundary line of Codori and by a curve to the right 80 feet to a stake on a line of said Benner estate and 25 feet distance at right angles from an east line of said railroad property; thence along said boundary line of said Benner S. 73° 45′ W. 5.4 feet to a stake; thence along boundary line of said Benner N. 3° 20′ E. 537 feet, parallel with and 15 feet distant at right angles from a centre line of said railroad property to a point in the centre of the tracks of the Gettysburg Electric Railroad; thence along the centre of the tracks of said railroad S. 73° 14′ E. 31 feet to the place of beginning. Containing 3 12-100 acres.

6. That the said tract of land hereinbefore described includes many important tractical positions occupied by numerous different commands and bodies of troops while actively engaged in the battle of Gettysburg, at some of its most critical periods. That if the title to the said tract be not vested in the United States it will be impossible to carry out effectually upon this part of the battlefield the purposes expressed in the said act of Congress, "preserving the lines of battle," "properly marking with tablets the positions occupied," and "determining the leading tactical positions of batteries, regiments, brigades, divisions, corps, and other organizations with reference to the study and correct understanding of the battle, and to mark the same with suitable tablets," as will appear from the blue prints annexed hereto.

7. That on the fourth day of January, 1895, the Secretary of War, in accordance with the provisions of the act of Congress approved August 1st, 1888, made an application to the Attorney-General to cause proceedings to be instituted for the condemnation of the said tract of land. Whereupon the Attorney-General, upon the seventh day of January, 1895, instructed the United States attorney for the eastern district of Pennsylvania to institute proceedings on behalf of the United States to condemn the said tract.

That no agreement can be made with the owners of the said tract for the purchase thereof.

9. That the Gettysburg Electric Railroad Company own and claims to own, or have some interest in or title to, the land and property hereinbefore described and proposed to be taken by condemnation by judicial process by the United States. Wherefore, the said Attorney-General of the United States, on behalf of the said United States, prays that your honorable court will appoint a jury, according to law, to estimate and determine the fair value of all and singular the estates or interests in the property so proposed to be taken for the use of the said United States as aforesaid, and designate the several owners thereof, as far as the same can be by them reasonably ascertained, and report the same to the court, and that upon the payment into the court or to the proper owners thereof of the amount assessed and ascertained as the value of the parcel of ground and property above described as aforesaid as the interest of the said parties therein, that the possession be awarded by this court to the United States, and that the absolute title to said property be and thereby rest in the said United States for the purposes aforesaid; and that the court will divide the sum so paid and order its distribution among the several claimants, according to their respective rights herein.

And your petitioner further prays for such other and further order as may be proper in proceedings for the appropriation of private property to the public use aforesaid and as may be necessary to enable the said United States of America to acquire the property heretofore described.

(Signed) ELLERY P. INGHAM,
United States Attorney.

EASTERN DISTRICT OF PENNSYLVANIA, *ss:*

Ellery P. Ingham, United States attorney for the eastern district of Pennsylvania, being duly sworn according to law, doth depose and say that

the facts hereinbefore set forth in the foregoing petition are true to the best of his knowledge and belief.

(Signed) ELLERY P. INGHAM,
United States Attorney.

Sworn and subscribed to before me, this day of January, A. D. 1895.

SAMUEL BELL,
United States Commissioner.

13 (Endorsed:) In the circuit court for the eastern district of Pennsylvania, third circuit, of October sessions, 1894, No. 64. The United States of America vs. A certain tract of land in Cumberland Township, Adams County, State of Pennsylvania. Petition of Ellery P. Ingham, United States attorney. Filed January 21, 1895. Samuel Bell, clerk, &c.

14 THE UNITED STATES OF AMERICA, *vs.* A CERTAIN TRACT OF LAND IN CUMBERLAND Township, Adams County, State of Pennsylvania. } U. S. C. C., E. D. of Pa. No. 64. Oct. sess., 1894.

Decree.

And now, this 21st day of January, A. D. 1895, the petition of Ellery P. Ingham, esq., United States attorney for the eastern district of Pennsylvania, having been presented and filed on behalf of the United States, the court, upon due consideration thereof, do order, direct, and decree that five days' notice of the presentation and filing thereof be given to the respective owners and parties in interest as in the said petition set out, by serving notice personally thereof upon the said owners and parties in interest, respectively; and that Tuesday, the 29th day of January, A. D. 1895, at ten o'clock a. m., is hereby fixed for the hearing of said petition.

BY THE COURT.
S. B.

(Endorsed:) U. S. Cir. Ct., E. D. of Pa. No. 64, Octr. sess., 1894. United States of America vs. A certain tract of land in Cumberland Township, Adams Co., Penna. Order of court sur petition of Ellery P. Ingham, U. S. atty. Filed Jan. 21, 1895. Samuel Bell, clerk.

15 In the circuit court of the United States for the eastern district of Pennsylvania.

UNITED STATES OF AMERICA *vs.* A CERTAIN TRACT OF LAND IN CUMBERLAND Township, Adams County, State of Pennsylvania. } October sessions, 1894. No. 64.

The answer of the Gettysburg Electric Railway Company to the petition of Ellery P. Ingham, esq., United States attorney.

The said Gettysburg Electric Railway Company, answering the said petition, says:

I. That it, the Gettysburg Electric Railway Company, is a corporation existing under the laws of Pennsylvania, formed by articles of association,

filed July 28th, 1891, under the act approved May 14th, 1889, providing for the incorporation and government of street railway companies.

By the fourth section of the said articles, the streets and highways upon which the said railway is laid and constructed, and the circuit of the route, are as follows: From a point on Carlisle street, Gettysburg, Adams County, Pennsylvania, at the intersection of Railroad street; thence southwardly on said Carlisle street through Centre square and upon and along Baltimore street and Baltimore pike to the borough limits, and from an intersection on Centre square westwardly upon and along Chambersburg street and Springs road to the borough limits, and from the inter-
16 section of Washington street and Chambersburg street southwardly upon and along Washington street and Taneytown road to the borough limits, and from said intersection of Washington street and Chambersburg street northwardly upon and along Washington street to Railroad street.

Under and in accordance with the provisions of the said act of assembly, certain extensions or branches were duly authorized on February 4th, 1892, the proceedings in relation to which were recorded on February 9th, 1892, in the office for recording of deeds for the county of Adams, in Deed-book S. S., folio 192; one of said branches or extensions beginning at a point on the Baltimore pike at the Gettysburg borough limits; thence along and upon said pike in a southerly direction about six hundred feet; thence through land of the said company in a westerly direction about eighteen hundred feet to the Taneytown road; thence along and upon said Taneytown road in a northerly direction about four hundred feet (with two branches along and upon said Taneytown road, one in a southerly direction about one thousand feet to Meade's headquarters, the other in a northerly direction about eight hundred feet to the Gettysburg borough limits); thence in a westerly direction through land of the said company about six hundred feet; thence in a southerly direction thirty-three hundred feet to the Round Top extension of the Gettysburg and Harrisburg Railroad; thence along and upon the right of way of the said Round Top extension of said railroad fifty-five hundred feet in a southerly direction to a point one hundred feet northerly from the Round Top warehouse on the said railroad; thence in a westerly direction through land of said electric railway company about three hundred feet to the public road leading from the Taneytown road to the Emmittsburg road by way of Round Top station; thence partly along and upon said public road, and partly on land of said company westwardly about five hundred feet; thence through land of said company in a southwesterly direction about thirty-two hundred feet; thence through land of said company in a northwesterly direction forty-one hundred feet to the aforesaid pub-
17 lic road leading from the Taneytown road to the Emmittsburg road; thence partly through land of said company and partly upon and along said public road westwardly about twelve hundred feet to the Emmittsburg road; thence along and upon said Emmittsburg road in a northerly direction about eighty-four hundred feet to the Gettysburg borough limits.

And the others, beginning at a point on Springs road or avenue and the Gettysburg borough limits; thence along and upon said Springs road or avenue in a westerly direction about twenty-three hundred feet, with

a branch still along and upon said Springs road or avenue to the Gettysburg Mineral Springs Hotel for a distance of about three thousand feet; thence northwardly through private land nearly parallel with Reynolds avenue about five thousand feet to the Mummasburg road; thence southeasterly along and upon said Mummasburg road about four thousand feet to the Gettysburg borough limits. Also beginning at the point where Howard avenue intersects the Mummasburg road; thence northeastwardly nearly parallel with Howard avenue through private land twenty-eight hundred feet; thence southwardly through private land about three thousand feet to the borough of Gettysburg limits. Also beginning at the intersection of Howard avenue with the Carlisle road; thence southwardly upon and along the Carlisle road about twenty-one hundred feet to the Gettysburg borough limits.

The supervisors of Cumberland Township, Adams County, have duly consented to the construction of the said branches or extensions upon the streets and highways forming part of the routes thereof.

II. By two certain deeds of conveyance, made in the year 1891, this defendant acquired as a part of the route of one of the said branches or extensions, and for the purpose of using the same as part of its right of way, the tract of land particularly mentioned and described in paragraph 5 of the said petition, and which is the subject of the present condemnation proceedings. The said tract of land is a narrow strip about twenty-six hundred feet long.

18 III. The said Gettysburg Electric Railway Company located the line of one of the said branches or extensions over and upon the tract of land mentioned in the said petition, upon its acquisition as aforesaid, and purposes to construct its railway track throughout the entire length thereof. The said tract of land is an integral part of the right of way of the said branch or extension and of the franchise of said company.

IV. The effect of the condemnation of the said strip of ground will be to cut off a part of the said branch railway or extension, destroy its continuity, and prevent its construction and operation.

The said Gettysburg Electric Railway Company does not possess the right of eminent domain, and if the said part of its said branch railway be appropriated and taken from it it will not be able to procure adversely from the owners of the adjoining land any other ground in the place thereof, upon which to build its railway and complete and preserve the route of the said extension.

V. The capital stock of the Gettysburg Electric Railway Company is $200,000, of which $100,000 has been issued. The said company has also issued mortgage bonds to the amount of $200,000, all of which are outstanding in the hands of holders for value. The said bonds and stock or the proceeds thereof have been used and expended in the construction of the said company's railway, and a large part of said proceeds has been expended in the construction of the branch or extension, of which the ground sought to be condemned is a part.

VI. The greater part of the appropriation of $25,000 under the act of March 3d, 1893, and some part of the sum of $50,000 under the act of August 18th, 1894, have already been expended for the purposes stated therein.

VII. It is not true that in order to carry out the purposes of
19 the said act of March 3d, 1893, or any of them, or to completely execute the said act, it is necessary that the United States shall condemn and appropriate or acquire the tract of land in said petition specified. On the contrary, the respondent avers that the proposed condemnation of a part of its right of way and of its railway and of the franchise connected therewith is an arbitrary use of supposed power, exercised only for the avowed purpose of driving the railway of the respondent entirely off the battlefield of Gettysburg.

The respondent denies that the lines of battle at Gettysburg and the positions occupied by the various commands of the armies of the Potomac and of Northern Virginia on that field are truly and accurately indicated and shown on the blue print annexed to the petition.

On the contrary, it avers that the line of the said branch railway has been arbitrarily marked and designated as being exactly coincident with the said lines and positions, in order that it may seem to appear that in fact both are upon precisely the same strip of ground, and that therefore the line of the said branch railway is needed to carry out the purposes of the said act. This is so patent that a mere inspection of the said blue print suggests the thought at once.

The respondent avers that the proposed condemnation of a part of its branch railway is an abuse of power, if any exists, which should not be permitted to be carried into successful execution.

Witness the seal of the said Gettysburg Electric Railway Company, this fifth day of February, 1895.

[SEAL.] E. M. HOFFER,
President.

Attest:
H. G. WALMER, *Secretary.*

CHARLES HEEBNER.
THOMAS HART, Jr.

No. 64. Oct. sess., 1894. The United States of America vs. A certain tract of land in Cumberland Township, Adams Co., State of Pennsylvania. Answer of Gettysburg Electric Railway Co. Filed Feb. 5, 1895. Samuel Bell, clerk.

20 In the circuit court of the United States for the eastern district of Pennsylvania, third circuit.

THE UNITED STATES OF AMERICA *vs.* A CERTAIN TRACT OF LAND IN CUMBERLAND Township, Adams County, State of Pennsylvania.	Of October sessions, 1894. No. 64.

Sur petition of Ellery P. Ingham, esq., United States attorney.

The Gettysburg Electric Railway Company, the owner of the tract of land mentioned in the said petition, moves to quash the said petition, and assigns causes therefor as follows:

I. The act of Congress, approved August 1st, 1888, provides for the acquisition of real estate by the United States by condemnation only for

the erection of public buildings or for other public uses. It does not appear in the said petition that the Secretary of War has been authorized to procure the tract of land mentioned in the fifth paragraph of the said petition, belonging to the Gettysburg Electric Railway Company, for the erection of a public building or for other public uses. The purposes named for the expenditure of the appropriation in the act of Congress of March 3d, 1893, are not such public uses as authorize the condemnation by the United States of the real estate of private persons.

21 II. The purposes specified in the sixth paragraph of the said petition, namely, "of preserving the lines of battle," "properly marking with tablets the positions occupied," and "determining the leading tectical positions of batteries, regiments, brigades, divisions, corps, and other organizations with reference to the study and correct understanding of the battle, and to mark the same with suitable tablets," are none of them public uses or purposes authorizing the condemnation by the United States of private proverty.

III. Because it appears by the answer of the Gettysburg Electric Railway Company to the said petition, filed with this motion, that the Gettysburg Electric Railway Company is a corporation of the State of Pennsylvania, formed by articles of association on July 28th, 1891, under the act of assembly providing for the incorporation and government of street railway companies, approved May 14th, 1889, for the construction of a railway from a point in Gettysburg, Adams County, Pennsylvania, upon and along certain highways to the borough limits, and that under and in accordance with the provisions of the said act, certain extensions or branches were duly authorized on February 4th, 1892, the proceedings in relation to which were recorded on February 9th, 1892, in the office for the recording of deeds in and for the county of Adams, in Deed-book S. S., folio 192. The said branches are particularly described in the said proceedings, and in the answer of the said Gettysburg Electric Railway Company to the said petition.

And because it so appears that the tract of land particularly mentioned in the fifth paragraph of the said petition, belonging to the said electric railway company, was acquired by various deeds of conveyance as a part of the right of way of one of the said branches or extensions, and that in point of fact the said tract of land sought to be condemned, which is a long narrow strip several thousand feet in length, is a part of the right of way of one of the said branches or extensions and of the franchise of the said electric railway company, the effect of the condemnation of

22 which will be to cut off part of the said branch, destroy its continuity, and prevent its complete construction.

Neither the act of Congress approved August 1st, 1888, nor the act approved March 3d, 1893, nor the joint resolution approved June 6th, 1894, nor the act of Congress approved August 18th, 1894, was intended to authorize the Secretary of War to procure for the United States by condemnation any land which had been already devoted to a public use.

IV. The said petition does not show any authority in the Secretary of War warranting the condemnation of a part of the railway and franchises of the Gettysburg Electric Railway Company.

V. If the acts of Congress and the joint resolution mentioned in the said petition were intended to authorize the acquisition by condemnation of a railway and the franchises connected therewith, they will not be taken

to authorize the appropriation of a part only thereof. The right of way obtained for the railway of the respondent and the franchise of operating the railway thereupon is a unit, and is not capable of subdivision and partial appropriation.

VI. It does not appear by the said petition that any appropriation has ever been made by Congress for the purchase of the real estate mentioned in the fifth paragraph of the petition, or of any real estate to be acquired for the purposes referred to in the act of March 3d, 1893, or for the payment of damages therefor in case of the condemnation thereof. The said act does not provide any means by which the respondent can obtain payment of the damages to be awarded to it for the appropriation of the said tract of land. If the said petition be allowed and a jury be appointed, and the property of the said Electric Railway Company be condemned and appropriated, the said company will be without any remedy whereby payment of the damages awarded can be obtained or enforced.

23 VII. Because it appears by the said answer of The Gettysburg Electric Railway Company that the appropriations of $25,000 mentioned in the said act of March 3d, 1893, and of $50,000 mentioned in the act of August 18th, 1894, have been to a large extent already expended for the purposes specified in the said act, and that in point of fact no adequate fund exists for the payment of the damages to be awarded the respondent for the appropriation of the said strip of ground.

VIII. Because it is provided in the joint resolution of Congress approved June 6th, 1894, set out in the fourth paragraph of the said petition, "that no obligation or liability upon the part of the Government shall be incurred under this resolution or any expenditure made, except out of appropriations already made and to be made during the present session of this Congress." The said joint resolution thus places a limit upon the amount of damages for which only an obligation or liability on the part of the Government is recognized, and prohibits this respondent from obtaining payment from the United States of any sum which may be awarded to it in excess of the balance remaining of the appropriations made by the acts of March 3d, 1893, and August 18th, 1894. The said joint resolution is therefore unconstitutional and void.

IX. The said joint resolution of Congress, approved June 6th, 1894, provides for the acquisition by purchase or condemnation of such lands as in the judgment of the Secretary of War may be necessary for the complete execution of the act of March 3d, 1893. It does not appear in or by the said petition that the Secretary of War has determined that in his judgment the acquisition of the tract of land mentioned and described in the said petition is necessary for the complete execution of the said act of March 3d, 1893.

X. It does not appear in and by the said petition for what particular purpose, of those mentioned in the act of March 3d, 1893, the strip of ground mentioned in the petition is necessary to be acquired.

24 XI. Because it appears by the answer of the said electric railway company that it is not necessary for the complete execution of the act of March 3d, 1893, that the strip of ground mentioned in the petition should be acquired by the United States, and that the proposed condemnation is an abuse of power.

XII. Because it does not appear in and by the said petition that any effort to agree with the said electric railway company for the purchase

of the tract of land mentioned in the petition, or for the settlement of the amount of the damages to be paid in case of condemnation thereof, has been made by the United States.

XIII. Because the said petition is in other respects defective and insufficient.

CHARLES HEEBNER.
THOMAS HART, Jr.

FEBRUARY 5th, 1895.

(Endorsed:) No. 64. Oct. sess., 1894. The United States of America vs. A certain tract of land in Cumberland Township, Adams Co., State of Pennsylvania. Motion to quash petition. Filed Feb. 5, 1895. Samuel Bell, clerk.

25 In the circuit court of the United States for the eastern district of of Pennsylvania.

THE UNITED STATES OF AMERICA *vs.* A CERTAIN TRACT OF LAND IN CUMBERLAND Township, Adams County, State of Pennsylvania.	October sessions, 1894. No. 64.

The further and amended answer of the Gettysburg Electric Railway Company to the petition of Ellery P. Ingham, esq., United States attorney.

The said Gettysburg Electric Railway Company, further answering the said petition, says:

That since the making of its answer, filed February 5, 1895, it has ascertained, and therefore now avers, that the balance remaining unexpended of the appropriation of $25,000 under the act of March 3, 1893, is only $2,882.17, and that of the said sum of $50,000, appropriated under the act of August 18, 1894, there has been already expended the sum of $14,000.

Witness the corporate seal of the Gettysburg Electric Railway Company, duly attested, this 18th day of February, 1895.

THE GETTYSBURG ELECTRIC RAILWAY CO.
[SEAL.] By E. M. HOFFER, *President.*
Attest:
H. G. WALMER, *Secretary.*

26 In the circuit court of the United States for the eastern district of Pennsylvania.

THE UNITED STATES OF AMERICA *vs.* A CERTAIN TRACT OF LAND IN CUMBERLAND Township, Adams County, State of Pennsylvania.	October sessions, 1894. No. 64.

The further and secondly amended answer of the Gettysburg Electric Railway Company to the petition of Ellery P. Ingham, esq., United States attorney.

The said Gettysburg Electric Railway Company, further answering the said petition, says:

That since the filing of its further and amended answer in the above entitled matter upon February 20, 1895, it has ascertained, and therefore now avers, that the entire balance remaining unexpended of the appropriation of $25,000 under the act of March 3, 1893, and of the sum of $50,000 appropriated under the act of August 18, 1894, are covered by contracts already made under authority from the Secretary of War for which the said appropriations were made, and that the execution of the said contracts will require the expenditure of the entire balance remaining of both the said appropriations; so that there is not, in point of fact, at this time, any part of either of the said appropriations which is
27 available for the purpose of paying and discharging any judgment which may be recovered by the Gettysburg Electric Railway Company in this proceeding.

Witness the corporate seal of the Gettysburg Electric Railway Company, duly attested, this 18th day of March, 1895.

THE GETTYSBURG ELECTRIC RAILWAY COMPANY,
[SEAL.] By E. M. HOFFER, *President.*
Attest:
H. G. WALMER, *Secretary.*

CHARLES HEEBNER.
THOMAS HART.

M'CH 20, 1895.

28 And afterwards, to wit, on the twenty-sixth day of March, in the year of our Lord one thousand eight hundred and ninety-five, come the parties aforesaid, by their counsel aforesaid, and this cause being called for argument on motion to quash petition, and having been argued by counsel for the respective parties, and the court not being fully advised in the premises takes further time for the consideration of the same.

And afterwards, to wit, on the twenty-third day of April, in the year of our Lord one thousand eight hundred and ninety-five, come the parties aforesaid, by their counsel aforesaid, and the court now being fully advised in the premises file the following opinions, viz:

29 Circuit court of the United States, eastern district of Pennsylvania.

THE UNITED STATES *vs.* A CERTAIN TRACT OF LAND IN CUMBERLAND Township, Adams County, Pennsylvania.	April sess., 1894.	No. 34.
SAME *vs.* SAME.	Oct. sess., 1894.	No. 64.

DALLAS, Cir. J. The right of the United States to take private property for public use, upon making just compensation, though questioned in Pol-

lard's Lessee v. Hagen, 3 How., 212, is now fully recognized; but that this right can not be exercised, within the limits of the several States, for any purpose which is not incident to some power delegated to the General Government, and necessary or at least adapted to its execution, is equally well settled. Hare on the Constitution, vol. 1, p. 346; Kohl v. U. S., 367; U. S. v. Fox, 94 U. S., 315; Van Brocken v. Tennessee, 117 U. S., 151; Cherokee Nation v. Kansas Railway Company, 135 U. S., 641 (656).

The end sought to be promoted in the present instance highly commends itself to patriotic sentiment, and strongly appeals to the generous impulses of all who justly esteem the services of those by whom the great battle of Gettysburg was fought and won; but such feelings may not be indulged in a place where justice is judicially administered without respect to persons, and where the Constitution of the United
30 States must be regarded as imperatively prescribing the paramount rule of civil conduct as well for the Government as for the people. Therefore the only question is, whether the object to the furtherance of which these petitions are directed is germane to the execution of any power vested in the General Government, and upon this question I have reached a conclusion which to me seems irresistible. The powers of Congress are distinctly enumerated in the Constitution, and in that enumeration none is included to which the uses for which it is proposed to condemn this land can be related, without, in my opinion, enlarging the constitutional grant by grafting upon its express terms a construction so lax and comprehensive as to be subversive of its limited character. The learned district attorney has referred to but a single clause (art. 1, sec. 8, cl. 1) as conferring the authority now claimed, and that clause is wholly irrelevant. The "power to lay and collect taxes to pay the debts and provide for the common defence and general welfare of the United States" is quite distinct from the right to take private property for public use; and it is not the power of taxation, but the right of eminent domain, which is here asserted.

Government may, in time of war, appropriate or destroy private property. This is justified by "the necessities of war" (U. S. v. Pacific Railroad, 120 U. S., 234); but no deduction from this doctrine of the public law can be made and applied in time of peace, be the incentive what it may, without violation of "the supreme law of the land."

31 Entertaining these views, with which no judicial decision that has been brought to my notice conflicts, it is impossible for me to sustain these proceedings.

In the first case, the exceptions to which this opinion is applicable are sustained.

In the second case the motion to quash is granted.

32 BUTLER, J. I regret that I cannot unite in the above conclusion. I do not propose to enter upon an argument to sustain my views, but to state very briefly the reasons on which they are founded.

While the Government may take land for public use, the use must be such as arises out of the exercise of its legitimate functions. It is not necessary, however, that the land or the use be indispensible. It is sufficient if it be convenient and serviceable. Within this limitation Congress and the Executive cannot be controlled; they are the judges. The courts

can only interfere where the limit is transcended. The Constitution does not define the special uses for which land may be taken; they could not be so defined; the occasion for them changes with the change of circumstances. As for instance, the Government has the care and wardship of the Indian tribes. It must provide for them, protect its citizens against them, and keep the public peace in this respect. Of recent times it has come to be believed that this duty can best be discharged by teaching them the arts and industries of civilized life. The Government has adopted this view, and consequently established schools for the purpose. Schoolhouses have thus become necessary. In some instances Government buildings have been appropriated to this use, and in other buildings
33 have been rented. That land may be taken for the creation of such schoolhouses I cannot doubt.

The land may be taken for customhouses, courthouses, post offices, &c., is not now questioned, though it was formerly denied. Here the use is virtually indispensible. If, however, it were a convenience merely, which facilitated the discharge of the Government's duties, the right to take would be equally clear.

It is the duty of the Government to raise and maintain armies and to fight battles when necessary. As a consequence, it is necessary to establish military schools, barracks, hospitals, &c. That land may be taken for these purposes is plain. It is absolutely necessary to a discharge of the duty. The right to take, however, is just as clear in the absence of such necessity, when the use aids the Government in this respect. If the construction of a railroad between the Capital and the seaboard, or any other po'nt where none exists, should become a military necessity or a useful convenience in the discharge of these duties, by facilitating the transportation of troops or munitions of war, the Government might take land and construct it without seeking for authority in any other constitutional provision. The power to raise and maintain armies imposes the duty of caring for its soldiers, promoting their welfare during life, and providing for decent burial (at least) after death, whether they die in battle or in time of peace. It may, therefore, do whatever is necessary to these ends. Conse-
34 quently it may establish hospitals, take land for cemeteries, &c. It could not leave its dead to fester where they fall. To do so would not only outrage public decency, but would raise a serious obstacle to the discharge of its express duty—the maintenance of armies—by inclining men to avoid its services It may erect monuments to commemorate special acts of heroism, and award pensions for meritorious services; because these and similar acts directly and materially tend to aid it in discharging the duty stated.

The land described in the petition is adjacent to the Gettysburg National Cemetery. I cannot doubt that it might have been taken to enlarge and improve that property. How much is necessary to that purpose Congress and the Executive are the judges of. This, however, is not the purpose named in the statute.

The land is required to carry out the provisions of the act of 1893, to wit: "For the purpose of preserving the lines of battles at Gettysburg, Pennsylvania, and for properly marking with tablets the positions occupied by the various commands of the armies of the Potomac and of the Northern Virginia on that field, and for opening and improving avenues

along the positions occupied by troops upon those lines, and *and* for fencing the same, and for determining the leading tactical positions of batteries, regiments, brigades, divisions, corps, and other organizations with reference to the study and correct understanding of the battle, and to mark the same with suitable tablets, each bearing a brief historical legend."

35 In my judgment this is a legitimate public use of the land. The battle was a great lesson in military science, the greatest ever taught on this continent, at least—a most important illustration in strategy and the art of war. That it may be fully understood and appreciated hereafter, it is necessary to do just what is proposed—preserve the battlefield in its original condition, mark the positions and movements of the troops and the differents arms of the service at the various stages of the battle, so that it may be seen, as upon a great chart, precisely how the battle was fought. The Government proposes to perpetuate and secure this lesson for the sake of what it may teach to those who at present constitute its armies, as well as to those who will hereafter constitute them. In my judgment this is a legitimate purpose, and it can only be accomplished by taking the land. The power to take it is, I believe, embraced in the power to maintain armies and teach them military science.

I understood the very able counsel who opposes the proceedings to say that the Government should own the land, but should obtain it by purchase. If the Government should own the land, it is because the Government has a legitimate use for it; otherwise it has no power to purchase, or even to accept it as a gift, and expend money for its improvement. But what authority can the Government take and hold land in trust for such purposes, unless they serve a legitimate public use, and especially expend money upon them? A concession that it may purchase, or accept the land as a donation, for the uses stated, seems to me to be plain

36 concession of the right to take. The Government has repeatedly accepted and improved lands for such uses; and the propriety of it has not even been questioned. It so accepted and improved the lands embraced in the Gettysburg National Cemetery and in the Chickamaga and Chattanooga National Park, expending large sums of money on each.

Furthermore, this battlefield is of transcendent national interest. The ground is hallowed and made sacred by the blood shed upon it at the most important epoch in the nation's history, in the supreme hour of its life. All right-minded men would say, I think, that it is fitting the nation should own and preserve it from desecration. It may be replied that this is mere sentiment. I think, however, it is something more. But if it is not, it is a most healthy sentiment, the encouragement of which directly tends to preserve the nation, and thus to aid the Government in discharging its highest duty. It may be said the same reasons require the ownership of all other important battlefields of the nation. I think not. If they do, however, the Government should own them, for the sake of what they teach and the love of country which they inspire. I believe the other objections urged against the proceeding, as well as the exceptions to the report of the jury, should also be dismissed.

37 In the circuit court of the United States for the eastern district of Pennsylvania.

THE UNITED STATES OF AMERICA
vs.
A CERTAIN TRACT OF LAND (3 12-100 acres) situate in Adams County, Pennsylvania.

October sessions, 1894. No. 64.

And now, to wit, April 23rd, 1895, this case coming on to be heard on a motion to quash the petition of the United States, and having been argued by counsel for the respective parties and fully considered by the court, it is ordered, adjudged, and decreed that the petition of the United States be quashed, and said petition be, and the same is hereby, dismissed.

GEO. M. DALLAS,
Cir. J.

(Endorsed:) No. 64. Oct. sess., 1894. C. C. U. S., E. D. of Pa. The United States of America vs. A certain tract of land, &c. Decree quashing and dismissing petition. Filed April 23, 1895. Samuel Bell, clerk, &c.

38 In the circuit court of the United States, E. D. of Pennsylvania.

THE UNITED STATES OF AMERICA
vs.
A CERTAIN TRACT OF LAND, CONTAINING 3 & 12-100 acres, situate in Adams County, Pennsylvania.

No. 64. Oct. sess., 1894.

The United States, plaintiff in the above stated action, believing itself to be aggrieved by the final judgment and decree entered against it on the 23rd day of April, 1895, in the above entitled proceedings, hereby prays for a writ of error to the Supreme Court of the United States, and that a transcript of the record and proceedings, and papers upon which such final judgment and decree was entered, duly authenticated, may be sent to the Supreme Court of the United States.

THE UNITED STATES OF AMERICA,
(By its attorney).

39 *Assignment of error.*

1st. The learned court erred in entering a judgment and decree sustaining the motion to quash the petition of the United States.

2nd. The learned court erred in entering a judgment and decree quashing the petition of the United States, and dismissing the same.

3rd. The learned court erred in not sustaining the petition of the United States, and overruling the motion to quash the same.

40 UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, sct.:

I, Samuel Bell, clerk of the circuit court of the United States of America, for the eastern district of Pennsylvania, in the third circuit, do

hereby certify the following to be a true and faithful copy of the original pleas and proceedings in the case of The United States of America, plaintiff, and a certain tract of land in Cumberland Township, Adams County, State of Pennsylvania. No. 64. October session, 1894. On file and now remaining among the records of the said court in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said court, at Philadelphia, this 30th day of April, in the year of our Lord one thousand eight hundred and ninety-five, and of the independence of the United States the one hundred and nineteenth.

[SEAL.] SAMUEL BELL,
Clerk of C. C.

(Indorsement on cover:) Case No. 15883. Term No., 999. The United States, plaintiff in error, vs. A certain tract of land in Cumberland Township, Adams County, State of Pennsylvania. Filed May 1st, 1895. E. Pennsylvania C. C. U. S.